IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
STACY HASKEW,	)	**Case No. 00-20792**
	)	
	)	**MEMORANDUM OF DECISION**
Debtor.	)	
	)	
	)	
	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

G. W. Haight, Coeur d'Alene, Idaho, counsel for Debtor.

Stacy Haskew, Post Falls, Idaho, for herself.

C. Barry Zimmerman, Coeur d'Alene, Idaho, Trustee.

Gary L. McClendon, Boise, Idaho, for the Office of the U. S. Trustee.

INTRODUCTION

This chapter 13 case, now dismissed, presents a dispute between an attorney and his client. At issue is the allowance of compensation to debtor's counsel. That issue arises because counsel would like the Trustee to distribute funds on hand in payment of his fees before the balance of the funds are returned to the debtor. His

client voiced her opposition to the request at a hearing on May 1, 2001. Evidence was presented. The Court took the matter under advisement to consider the issues raised in light of the entirety of the record.

BACKGROUND AND FACTS

The following facts are taken from pleadings of record, including the time entries attached to Mr. Haight's application for compensation, and from the testimony and documentary evidence presented at the May 1 hearing.

Stacy Haskew met with attorney G. W. Haight in June, 2000 regarding a possible bankruptcy filing. She paid him a "nonrefundable retainer" of $250.00. She returned to Mr. Haight on July 4 needing to complete her filing. Mr. Haight on that date prepared the petition, schedules and statements, and proposed chapter 13 plan for Ms. Haskew. He personally filed the pleadings with the Court on the evening of July 4 by utilizing the after-hours document depository located at the Federal Building in Coeur d'Alene, Idaho.

Tuesday, July 4, 2000 was a federal holiday. The pleadings before the Court were signed by both Mr. Haight and Ms. Haskew on July 4. The filing stamp mechanically affixed to the pleadings in the document depository stated that filing occurred on "June 34" which is obviously in error.[1] The Clerk's staff on Wednesday, July 5 amended the filing stamp to correct the error, but for some reason placed a date of July 2 on the petition. This also erroneous date has been perpetuated on the

[1] The last day of June was Friday, June 30. The stamp dating mechanism apparently continued to run unnoticed for the next 4 days, until the depository was used to lodge a pleading.

official Court records. But the Court finds that the evidence establishes a July 4 filing date.

An additional $910.00 in fees was paid by Ms. Haskew to Mr. Haight on July 4. This July 4 payment date is set forth in the statement of affairs and in the chronological listing of services and payments attached to Mr. Haight's Motion. No evidence was presented to establish that this payment was post-petition in nature.

The residence address of Ms. Haskew at filing and throughout the pendency of the case was 3150 W. Prairie Avenue, Post Falls, Idaho, 83854. However, Ms. Haskew was not physically at the residence from January 16 or 17, 2001 through the end of February, 2001. Her mail was retrieved by an acquaintance and provided to her during that time.

Ms. Haskew was periodically sent written communication by Mr. Haight or his staff during the case. Most of these were properly addressed. None were returned as undeliverable. Ms. Haskew denies receipt of any of these items.

The Trustee moved on November 16 to dismiss the case under § 1307 based upon the failure of Ms. Haskew to make the required monthly payments under her plan. She had by that date made only two regular monthly payments, for August and September, 2000. However, Ms. Haskew made a lump sum payment in December, 2000 equal to three monthly payments (*i.e.*, for October, November and December) and the motion was withdrawn. No other payments were made in the case.

The Trustee filed on January 25, 2001 another motion under § 1307, this time predicated on the failure of the Debtor to obtain confirmation of a plan.[2] The only impediments to confirmation at the time of the Trustee's motion appear to have been: (a) provision of an appropriate order of confirmation; (b) provision of the "agreed order" memorializing resolution of the Debtor's disputes with creditor Toyota Motor Credit, an order Mr. Haight had represented to the Court at hearing on the morning of November 28 was forthcoming; and (c) provision of Mr. Haight's fee affidavit.[3] Of course, payments to the Trustee would need to be current at the time of confirmation as well, though at the time of the Trustee's January 25 motion this amounted to only one month's payment.

The deficiencies were not resolved, and the Court granted the Trustee's motion and dismissed the case on March 6. The Trustee holds, at the present time, $1,578.65 in amounts Ms. Haskew paid under her unconfirmed plan.

Ten days after dismissal, Mr. Haight filed a "Motion of Attorney for Debtor in Dismissed Case for Payment of Fees, Declaration in Support Thereof, and Notice of Hearing Thereon" (the "Motion"). He asks for allowance of compensation and reimbursement of expenses in a total amount of $2,086.47 for this chapter 13 case.

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[2] Confirmation had been denied at hearing the afternoon of November 28, without prejudice to resubmission if remaining issues were resolved.

[3] Because the plan provided for payment of $500.00 to counsel in addition to prepetition amounts paid, total compensation sought exceeded the $1,000 which under local practice could be approved without such an affidavit.

He requests an order providing for payment by the Trustee in the amount of $926.47 which he will add to the $1,160.00 which he received prior to filing.

Mr. Haight set the Motion for hearing on May 1. The certificate of service attached to the Motion did not establish the fact of service of the Motion on his client, Ms. Haskew. However, on April 30, Mr. Haight filed an amended certificate of service stating that he personally mailed the Motion to her on March 16.

Ms. Haskew appeared personally at the May 1 hearing and raised objection to Mr. Haight's request. In addition to contesting the fact of service of the Motion and adequacy of notice, she objected to allowance of the requested compensation on the grounds that the additional $926.47 was in excess of the agreed fee for the case, and that Mr. Haight's representation of her had been inadequate throughout the case. This included, she contended, his failure to communicate with her regarding the status of the case through and including its dismissal. The U. S. Trustee also raised concerns over the possibility of unauthorized and unreported post-petition payments, and questioned the reasonableness of a $2,000 fee in a failed chapter 13 case.

Certain additional facts, and conclusions, concerning the nature of the fee arrangement between the Debtor and her counsel will be set forth below in the context of the discussion of the legal issues presented.

DISCUSSION AND DISPOSITION

A. The recurring issue of fees in dismissed chapter 13 cases.

Since the plan in this chapter 13 case was never confirmed, § 1326(a)(2) applies. It requires the Trustee to return to the Debtor all funds on hand as of the date of the dismissal, except to the extent administrative expenses are allowed.[4] If such administrative expenses exist, they are paid first before the Debtor is reimbursed.

This issue has come before the Court numerous times, and was addressed in *In re Jordan*, 00.1 I.B.C.R. 46 (Bankr. D. Idaho 2000).[5] *See also, In re Barrera*, 99.2 I.B.C.R. 68 (Bankr. D. Idaho 1999) (similar issue when the Trustee seeks approval and payment of expenses under § 503(b)(1)(A) before remitting the funds on hand to the debtor under § 1326). The Court has noted that, by virtue of the debtors' right to all funds on hand except to the extent § 503(b) expenses are allowed, they are truly adverse to any administrative expense applicant, including the trustee or their own attorney. The practical dynamics created by § 1326(a)(2) require the applicant

[4] The last sentence of § 1326(a)(2) states: "If a plan is not confirmed, the trustee shall return any such payment [made by the debtor under § 1326(a) and the plan] to the debtor, after deducting any unpaid claim allowed under § 503(b) of this title."

[5] The issues presented under § 1326(a)(2) are not foreign to Mr. Haight, as he was counsel in *Jordan*. In that case, as here, his clients received notice of his request for fees in the dismissed chapter 13, and appeared at hearing to express to the Court their objection to that request and their dissatisfaction with Mr. Haight's performance in the case.

to give clear notice to the debtor of the relief sought and the nature of the impact on the debtor's interest. *Jordan*, 00.1 I.B.C.R. at 47.

To elaborate, even though it is perhaps stating the obvious, a debtor's attorney seeking compensation in a dismissed chapter 13 case and payment from a Trustee under § 1326(a)(2) must do more than simply send a copy of a form fee application to his client. The debtor has no one, save the attorney he or she has hired, who can (and should[6]) advise them how § 1326(a)(2) works. Who else will explain to the debtors that the funds must be returned to them except to the extent the attorney's compensation or other administrative expenses are allowed? [7]

The Motion here, even assuming actual mailing as the amended certificate of service (but not the original certificate of service) alleges, does not establish that Ms. Haskew was adequately advised by Mr. Haight of her rights and interests. Nor is

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[6] *See*, Idaho Rules of Professional Conduct 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.")

[7] This is not a problem without a solution. All a debtor's counsel need do is ensure that the situation is explained to the client. Preferably, this should occur before the fee request is made to the Court. Others have met the challenge. For example, the attorney in *In re Lyman,* Case No. 00-21449, filed a pleading on March 23, 2001 entitled "Notice of Non-Objection to Disbursement of Attorney's Fees" which, in a straight-forward and plain-spoken way established the fact that the debtors had been properly advised and consented to the request. (The document is readily available through the RACER system on the Court's website.)

there evidence establishing that Mr. Haight in some other fashion advised her.[8]

However, since the U.S. Trustee and Ms. Haskew personally appeared on May 1 and ensured that the matter did not proceed by default, and since the Court has the opportunity to ensure that compensation is reasonable under the evidence and the controlling authorities, the inadequacy of notice does not mandate summary denial and renoticing of the request.

B. The reasonableness and allowance of the fees and costs requested.

1. The question of a flat fee

The Debtor argues that her understanding and agreement with Mr. Haight was that the chapter 13 services were to be performed for a flat fee and, and that the agreed fee was the $1,160 she paid. Mr. Haight argues that this represented only a payment toward fees and costs, and that the total amount of fees was dependent upon the time actually spent on the matter.

Ms. Haskew and Mr. Haight entered into a written "Consumer Bankruptcy

[8] Exhibit 7 is a copy of a March 16 letter Mr. Haight testified was sent to Ms. Haskew. Like Exhibit 1, discussed below at n. 9, this Exhibit was never offered or admitted. Even if it were properly before the Court, it would only indicate that Mr. Haight told Ms. Haskew that "Enclosed is our final bill which will be paid from the balances on hand with the Trustee." (Emphasis added.) It did not address her claim to those funds or her right to contest the fees sought.

Retainer Agreement" (Exhibit 1).[9] That agreement provided for a $250.00 retainer and a $750 fee for a chapter 7 case. *See* ¶¶1(a), 1(b). However, a chapter 13 case was filed here and, under ¶1(d), a chapter 13 requires at least $250.00 in addition to the $250 and $750 under ¶¶1(a) and 1(b).[10] The agreement can be read to support the conclusion that a fee of $1,250.00 was required for this chapter 13 case, with $250.00 of this amount to be paid under the plan. This doesn't support Ms. Haskew's contention that a $1,160.00 fee was agreed.

The agreement is not the only document that addresses the question of fees. The chapter 13 plan which was filed on July 4 along with the petition, provided for $500.00 in additional fees to be paid through the plan. It was thus inconsistent with the agreement which in ¶1(d) spoke of only another $250.00. The plan was signed by Ms. Haskew.

The Rule 2016(b) disclosure prepared and filed by Mr. Haight on July 10, asserted that $1,160.00 ($185.00 in filing fees and $975.00 in attorneys' fees) was received prior to filing the statement, and that "$-0-" remained to be paid for services rendered or to be rendered in the case. This is consistent with Ms. Haskew's contention. However, it is not consistent with the plan filed July 4 which provided for

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[9] Mr. Haight was the only party to present documentary evidence. His Exhibit 1 was never offered nor admitted, nor were Exhibits 7, 8 or 9. Only Exhibits 2 through 6 were admitted. However, the material terms of Exhibit 1 were discussed by both attorney and client in testimony. A copy was also attached to the original 2016(b) disclosure filed on July 10. The Court will consider it.

[10] Paragraph 1(d) contains a blank so that the parties can agree on an amount greater than $250.00 which will be required and paid through the plan. No amount was inserted into the blank in ¶1(d) of Exhibit 1.

an additional $500.00 in fees to be paid. An amended Rule 2016(b) statement was filed on September 8. It asserted, again, that $1,160.00 was received prior to filing, but now, consistent with the plan, stated that $500.00 remained to be paid.

Both the Rule 2016(b) disclosures were inconsistent with the response to question 9 on the statement of financial affairs which indicated prepetition receipt of $160.00 in filing fees and $985.00 in attorneys' fees, for a total of $1,145.00.[11]

Mr. Haight relies on language in his Rule 2016(b) disclosures that indicate that post-petition services after the first scheduled confirmation hearing are not covered by the prepetition fees and the $500.00 under the plan. *Id.* at p.2, ¶¶ 6(c) and 7. However, it was not established that Ms. Haskew received the Rule 2016(b) disclosures.

With so many inconsistent statements, representations and expressions of understanding, what is or should be the agreed fee?

The primary goal of construction of contracts is to determine and give effect to the intent of the parties. *See, e.g.*, *Bilow v. Preco, Inc.*, 966 P.2d 23, 27-28 (Idaho 1998). If the intent is clear from the agreement, then the inquiry is ended. *Id.* If the agreement is ambiguous, the fact-finder may look to testimony and contemporaneous documents to establish intent. *Id.* Ambiguities are construed against the drafter of the documents. *See, e.g., Freeman & Co. v. Bolt*, 968 P.2d 247, 251 (Idaho App. 1998). This is particularly true in the case of documents which are not freely

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[11] The filing fee for chapter 13 cases had been $185.00 since December 29, 1999.

negotiable by the non-drafting party. *Farmers Ins. Co. v. Talbot*, 987 P.2d 1043, 1046-47 (Idaho 1999). See *also Osborn v. Boeing Airplane Co.*, 309 F.2d 99, 103, n.8 (9th Cir. 1962).

The Court finds and concludes that there are ambiguities in the agreement prepared by counsel (as well as inconsistencies between that agreement and the Rule 2016 disclosures), and that the same should be construed against him. Attorneys have ample opportunity to ensure that their fee arrangements are fully understood and adequately documented, and should take care that the same are unambiguously presented to and understood by their clients.

The agreement is not clear as to whether and which fees would be charged Ms. Haskew over and above the base fee quoted in ¶¶1(a)-(d). Mr. Haight deals with attorneys' fees as a regular part of his practice, and is undoubtedly familiar with how he reads the various provisions of his form agreement in order to determine what would be within the quoted fee and what would be separately charged and paid. The one-time consumer of his services is not in the same posture.

This approach to the agreement would lead to a finding that a $1,250.00 flat fee (inclusive of filing fee) was agreed. However, the Court cannot ignore the fact that Ms. Haskew signed, simultaneously with all the other documents on July 4, a plan which provided for an additional $500.00 to be paid Mr. Haight through the Trustee. The Court concludes that this was tantamount to an amendment of ¶1(d) of the agreement, so that $500.00 rather than $250.00 would be paid under the plan. Therefore, under the entirety of the record and in light of the foregoing analysis, the

Court finds and concludes that the parties agreed on a fee of $1,500.00 for the bankruptcy.

Ms. Haskew paid $1,160.00 pre-petition toward the cost of her bankruptcy representation. She therefore owes $340.00, assuming the Court determines that fees and costs of $1,500.00 have been justified in this matter.

2. The reasonableness of the fee.

Counsel for chapter 13 debtors may recover attorneys' fees pursuant to § 330(a)(4)(B), which authorizes allowance of "reasonable compensation ... based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." A nonexclusive listing of relevant factors is set forth in § 330(a)(3). The burden of establishing entitlement to compensation, and its reasonableness, is on counsel. *In re Xebec*, 147 B.R. 518, 524 (9th Cir. BAP 1992); *In re Dale's Crane, Inc.*, 99.1 I.B.C.R. 8 (Bankr. D. Idaho 1999); *In re Ferreira*, 95 I.B.C.R. 282, 283 (Bankr. D. Idaho 1995). The Court may award less than what has been requested. § 330(a)(2). The Court has an independent obligation to examine the reasonableness of the fees sought. *In re Auto Parts Club, Inc.*, 211 B.R. 29, 33 (9th Cir. BAP 1997).

One approach employed in evaluating reasonableness is calculation of a "lodestar" amount, which is generated by multiplying the number of hours spent in performing actual, necessary and reasonable services by an appropriate hourly rate. *In re For-Rose Plumbing, Inc.*, 99.2 I.B.C.R. 69, 71 (Bankr. D. Idaho 1999); *In re Western Quay Assoc. Ltd. Partnership*, 94 I.B.C.R. 193, 194 (Bankr. D. Idaho

1994). *See also* § 330(a)(3)(A),(B),(D). The Court deems it appropriate to review the submissions under this approach.[12]

Mr. Haight's motion contains an itemization of time spent which, at effective hourly rates of $125.00 for himself and $55.00 for his paralegal, and adding expenses, totals the $2,086.47 sought.

No evidence was presented regarding the appropriateness of the hourly rates asserted. The Court, however, reviews literally hundreds of fee applications yearly, and can readily conclude that these rates are within the full range of rates charged in the District for similar types of services. In the absence of specific objection and evidence, the Court finds it difficult to say that these hourly rates are not reasonable for consumer debtor representation.

Neither the Debtor nor the U.S. Trustee pointed to specific services which they deemed objectionable. Their concern was more to the effect that the overall bill was excessive given the quality of representation. While this concern may be heartfelt, it does not assist the Court in performing its mandated review under the applicable statutes or precedent.

In general, after a detailed review of the itemization, the Court finds few problems with the time spent on services as disclosed in the Motion. There is,

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[12] A fee need not always be calculated on an hourly basis. A flat fee could be a reasonable fee under § 330(a)(4)(B). *In re Yates*, 217 B.R. 296, 300-02 (Bankr. N.D. Oklahoma 1998). But the Court must still evaluate the appropriateness of the amount of the fixed fee, here $1,500.00. And, of course, Mr. Haight argues in favor of an hourly fee approach, which also suggests that the Court conduct a lodestar analysis.

however, one significant exception. On July 4, Mr. Haight charged 5.2 hours to: "Prepare Petition, prepare Plan, consultations with client."[13] This raises a couple of issues.

Here it appears that circumstances dictated that the filing be accomplished on July 4, a holiday. It appears that Mr. Haight's paralegal was not involved in preparing the paperwork necessary for filing, as her itemized services appear only months later. The completion of required forms and typing ordinarily done by clerical staff (or perhaps, in certain limited regards, by paraprofessionals) here appears to have been done by counsel. Clerical services are not compensable under § 330, whether done by attorneys, paralegals or staff. *See Jordan*, 00.1 I.B.C.R. at 48-49; *In re Good*, 97.2 I.B.C.R. 42, 43 (Bankr. D. Idaho 1997) (same proposition, applied to creditor's § 506(b) fees). *Accord In re Grosswiler Dairy, Inc.*, 257 B.R. 523, 530 (Bankr. D. Montana 2000); *In re Columbia Plastics, Inc.*, 251 B.R. 580, 588-90 (Bankr. W.D. Washington 2000). While Mr. Haight's commitment to promptly obtaining relief for his client may be commendable, that does not mean that the clerical aspects of the work performed on July 4 are to be compensated at $125.00 per hour.[14]

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[13] Upon the present record, the Court must assume that this entry also encompasses preparation of the schedules and the statement of financial affairs.

[14] If Mr. Haight actually had the assistance of clerical staff, and charged 5.2 hours solely for consultation with Ms. Haskew, evaluation of her bankruptcy options, and legal supervision and review to ensure the information was correctly inserted into the bankruptcy forms, then the record he presents is inadequate to justify the claim and he has not met his burden. *See also* discussion at n.15, *infra*.

Lumping compensable services together with noncompensable services makes it difficult if not impossible to determine the amount of time actually spent on the compensable services. In such situations, the Court may deny compensation requested in the lumped entry. *See, e.g., In re Recycling Indus., Inc.*, 243 B.R. 396 (Bankr. D. Colo. 2000). However, under the present record and the circumstances evidenced thereby, the Court would allow 3.0 hours, and disallow 2.2 hours ($275.00) of the July 4 time entry.[15]

Two smaller entries are also problematic. The first, on January 26, is for .5 hours spent in, among other things, preparing a confirmation order. There is a second entry that same day which also includes a charge for preparing a confirmation order. This appears duplicative. The second, on February 6, is for .3 hours to "Review file and prepare letter to [Ms. Haskew] re confirmation issues." The February 6 letter, Exhibit 6, does in fact identify confirmation problems.[16] It asks Ms.

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[15] In reaching this conclusion, the Court has reviewed in detail the schedules, statement of affairs and plan. The plan used here is this District's mandated form plan, which requires only insertion of details as to creditor treatment for completion. The plan terms are themselves simple: Debtor makes 60 monthly payments of $315.73 (a figure drawn directly from schedules I and J); the funds are distributed by the Trustee to pay real estate taxes, cure a home mortgage default and pay for a car; and regular payments on the home mortgage are directly paid by Debtor "outside" the plan and are reflected in her budget. Neither the schedules nor plan reflect extraordinary or uncommon debts, assets or issues.

[16] This letter referred to Mr. Haight's inability to resolve matters with Toyota Motor Credit, a statement which is at least incomplete in light of, if not contrary to, the

(continued...)

Haskew to call and make an appointment so that matters could be reviewed and the bankruptcy moved along. But what it does not do is identify the impending motion filed by the Trustee on January 25 seeking to dismiss the case, nor does it alert Ms. Haskew to the potential result if the matter was not resolved within 20 days of that motion, *i.e.*, about February 14, a date only a week away.[17] The Court concludes the .8 hours ($100.00) reflected by these two entries are inadequately explained and justified, and would not be allowed.

Subtracting $375.00 for these items from the $2,086.47 Mr. Haight seeks by way of his Motion would yield $1,711.47. This analysis establishes, therefore, that the $1,500.00 charge for handling Debtor's chapter 13 case – a fee arrived at under the agreement Mr. Haight and Ms. Haskew executed, as supplemented by the plan

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[16](...continued)
representations Mr. Haight made to the Court on November 28 regarding settlement with this creditor. The Court further notes the absence of any time entries around that November hearing date referring to negotiations or settlement.

[17] The Trustee served a copy of this motion on Ms. Haskew. But Mr. Haight's letter could reasonably lead someone in her position to believe that the 20 day deadline was not absolute.

Ms. Haskew signed and proposed – is reasonable.[18] Since Mr. Haight was paid $1,160.00 prepetition, the Court will authorize the Trustee to distribute $340.00 to Mr. Haight under § 1326(a)(2). The balance of funds held by the Trustee ($1,238.65) will be returned to Ms. Haskew unless other administrative expenses are allowed.[19]

CONCLUSION

In consideration of all the issues presented, and the findings of fact and conclusions of law set forth above under Rules 9014 and 7052, the Court will allow and award attorneys' fees and reimbursement of costs in the total amount of $1,500.00 to Mr. Haight. Such allowance under § 330(a)(4)(B) is entitled to treatment as an administrative expense under § 503(b)(2). Counsel has received and may retain $1,160.00 for application toward this allowance. The Trustee shall therefore distribute $340.00 to Mr. Haight under § 1326(a)(2) on his § 503(b)(2) administrative expense. The Motion will otherwise be denied, as will the remaining objections to the Motion. An Order consistent herewith will be entered.

Dated this 18th day of May, 2001.

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[18] By virtue of these findings, if the Court were to agree with Mr. Haight that the parties contracted for fees to be charged on an hourly fee basis and the Motion evaluated solely on that basis, the Court would find Mr. Haight entitled to an allowance of $1,711.47. He would receive $551.47 from the Trustee, with $1,027.18 being returned to Ms. Haskew.

[19] Under these factual findings, were the Motion evaluated solely on an hourly fee basis, Mr. Haight would be entitled to $1,711.47, and receive $551.47 from the Trustee, with $1,027.18 being returned to Ms. Haskew.